

**The claimant believed he was complying with the employer's expectation that he "immediately" report an accident involving the employer's vehicle, when he reported the accident 25 minutes after it occurred. The claimant did not intend to flee the scene of an accident when he drove a short distance away in order to find a safe place to park the employer's truck.**

**Board of Review  
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**Issue ID: 0018 5843 04**

## **BOARD OF REVIEW DECISION**

### **Introduction and Procedural History of this Appeal**

The claimant appeals a decision by Margaret Blakely, a review examiner of the Department of Unemployment Assistance (DUA), to deny unemployment benefits. Benefits were denied on the ground that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest, pursuant to G.L. c. 151A, § 25(e)(2).

The claimant had filed a claim for unemployment benefits, which was approved in a determination issued by the agency on May 20, 2016. The employer appealed to the DUA Hearings Department. Following a hearing on the merits, the review examiner reversed the agency's initial determination in a decision rendered on July 15, 2016. The claimant sought review by the Board, which denied the appeal, and the claimant appealed to the District Court, pursuant to G.L. c. 151A, § 42.

On April 6, 2017, the District Court ordered the Board to obtain further evidence. Consistent with this order, we remanded the case to the review examiner to take additional evidence from the claimant. Both parties attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact.

The issue before the Board is whether the review examiner's conclusion that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest is supported by substantial and credible evidence and is free from error of law, where, following remand, the record indicates the claimant neither fled the scene of nor failed to report an accident involving the employer's vehicle.

After reviewing the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, the claimant's appeal, the District Court's Order, and the consolidated findings of fact, we reverse the review examiner's decision.

### **Findings of Fact**

The review examiner's consolidated findings of fact and credibility assessments, which were issued following the District Court remand, are set forth below in their entirety:

1. The claimant worked as a full-time driver helper for the employer, a retail lumber company, between 09/10/2014 and 04/19/2016, when he separated.
2. The claimant's direct supervisor was the warehouse manager.
3. The employer had a policy requiring employees to "immediately report damage to, or an accident involving [employer] equipment..." The purpose of this policy was to ensure the employer was informed of any accidents. The disciplinary consequence for violating this policy is determined on a case by case basis. The employer communicated this policy to the claimant through the employee manual, for which the claimant signed a "Receipt and Acknowledgement" on 09/30/2014.
4. The employer expected employees to immediately report an accident involving a company vehicle. The purpose of this expectation was to ensure the employer was informed of any accidents. The employer communicated this expectation to the claimant through the policy contained in the employee manual.
5. The employer expected employees in an accident involving a company vehicle to stop immediately and not flee the scene of the accident. The purpose of this expectation was to ensure that contact and insurance information could be exchanged between the drivers. The employer did not explicitly communicate this expectation to the claimant, but believed the claimant was aware of such as a licensed motor vehicle operator in Massachusetts.
6. The claimant is diagnosed with depression and anxiety.
7. 04/18/2016 was a holiday, specifically Patriot's Day.
8. On 04/18/2016, the claimant was driving one of the employer's long flat-bed trucks (approximately 20 feet in length) and hit another vehicle from behind, driven by driver A, while at a stop light of an intersection.
9. The claimant did not stop at the intersection to exchange information with driver A because the intersection was busy, he did not want to block the intersection, and he did not think it was safe to block the intersection.
10. The claimant turned into a shopping center plaza. The shopping center was busy because of the holiday. The claimant did not drive behind the supermarket in the shopping center and did not attempt to flee the scene of the

accident. The claimant drove to a parking area where the employer's vehicle would fit and where it was safe to wait for driver A.

11. The claimant believed he was complying with the employer's expectation that he stop immediately and not flee the scene of the accident.
12. The claimant was having an anxiety attack and called his girlfriend while waiting for driver A. The claimant's girlfriend instructed the claimant him [sic] to calm down, turn off his phone, and tell the employer what happened. The claimant ended the call when he saw driver A.
13. The claimant waved down driver A, exchanged contact information with driver A, and took photographs of the damage.
14. Approximately twenty five (25) minutes after the accident, the claimant spoke to one of the owners, who instructed him to tell the warehouse manager what happened. The claimant believed he was complying with the employer's expectation to immediately report the accident involving the company's vehicle.
15. The company vehicle had the company name and telephone number on it. Driver A notified the warehouse manager of the accident involving the claimant. Driver A reported to the warehouse manager the area where he was expecting the claimant to stop, and reported the area where he alleged finding the claimant. Driver A reported that he believed it appeared as though the claimant was trying to avoid the situation.
16. The claimant arrived back at the employer's location and met with the warehouse manager on 04/18/2016.
17. On 04/19/2016, the employer terminated the claimant's behavior [sic] for failing to immediately report the accident and fleeing the scene on 04/18/2016.
18. The warehouse manager compiled a written statement of the events of 04/18/2016 dated 05/18/2016 in response to a request from the Department of Unemployment Assistance (DUA) for additional information.

Credibility Assessment:

During the remand hearing, the claimant provided detailed, direct testimony about the sequence of events following the accident, in addition to providing direct testimony about his own state of mind in that he believed he was complying with the employer's expectations. The claimant's direct testimony, specifically that he was having an anxiety attack, was corroborated with consistent testimony from the claimant's girlfriend. Though the claimant and warehouse manager had a meeting with each other after the accident occurred

on 04/18/2016, and there was a dispute between the parties about the contents of that meeting, the warehouse manager's written statement was compiled one (1) month after the incident occurred. The warehouse manager's written statement about the events of 04/18/2016 created one (1) month after the incident is less reliable than the claimant's direct firsthand testimony. The warehouse manager was not present during the accident, and offered only hearsay testimony about the sequence of events following the accident based upon driver A's reporting to him, and driver A's reported perceptions about the claimant. As such, the claimant's direct testimony in this case is deemed to be more credible than the hearsay testimony of the employer.

### Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's original conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

Because the claimant was terminated from his employment, his qualification for benefits is governed by G.L. c. 151A, § 25(e)(2), which provides, in relevant part, as follows:

[No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter] . . . (e) For the period of unemployment next ensuing . . . after the individual has left work . . . (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit's interest . . . .

The review examiner found that the employer expected the claimant to refrain from fleeing the scene of an accident involving an employer vehicle, and to immediately report any accidents to the employer. The examiner also found that the employer discharged the claimant from his employment on April 19, 2016, after concluding that the claimant had been in an accident while driving the employer's vehicle on April 18, 2016, and he fled the scene of the accident and failed to report the accident immediately to the employer. In order to deny benefits under G.L. c. 151A, § 25(e)(2), it must be shown that the claimant acted with "intentional disregard of [the] standards of behavior which his employer has a right to expect." Garfield v. Director of Div. of Employment Security, 377 Mass. 94, 97 (1979). Thus, "the critical issue in determining whether disqualification is warranted is the claimant's state of mind in performing the acts that cause his discharge." Id.

After listening to the claimant's testimony on remand, the review examiner found him credible with respect to his actions and state of mind at the time of the accident. That credibility assessment and the resultant findings are within the scope of the review examiner's role as the fact-finder, and because they are not unreasonable in relation to the evidence presented, we will not disturb them. *See* School Committee of Brockton v. Massachusetts Commission Against

Discrimination, 423 Mass. 7, 15 (1996). The review examiner found that the claimant did not flee the scene of the April 18<sup>th</sup> accident. Rather, the claimant drove away from the site of the accident, a busy intersection, and parked in a nearby parking lot in order to avoid creating a dangerous situation. The claimant then waved over the other driver involved and exchanged information. In light of these consolidated findings, we conclude that while some of the claimant's actions might have given the appearance that he planned on fleeing the scene in order to avoid taking responsibility for the accident, his intentions were to the contrary. Absent a showing of an intent to disobey the employer's accident procedures, the claimant's decision to drive somewhat away from the site of the accident does not constitute deliberate misconduct in wilful disregard of the employer's interest. See Garfield, 377 Mass. at 97.

The review examiner also found that in reporting the accident approximately twenty-five minutes after it occurred, the claimant believed that he was notifying the employer of the accident in the immediate manner expected by the employer. The Supreme Judicial Court has made clear that a claimant may not be disqualified from receiving benefits when the worker had no knowledge of the employer's expectation. Garfield, *supra*, at 97. While it was established that the claimant knew he was expected to immediately report any accident to the employer, there is no indication in the record that the employer ever defined the term "immediately" for the claimant. Absent a knowledge of the employer's expectation with respect to the *exact* time that an accident should be reported, we cannot conclude that the claimant intentionally failed to comply with that expectation.

We, therefore, conclude as a matter of law that the claimant's discharge is not attributable to deliberate misconduct in wilful disregard of the employer's interest.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending April 23, 2016, and for subsequent weeks, if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - July 31, 2017**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

Member Judith M. Neumann, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT  
COURT OR TO THE BOSTON MUNICIPAL COURT  
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

To locate the nearest Massachusetts District Court, see:  
[www.mass.gov/courts/court-info/courthouses](http://www.mass.gov/courts/court-info/courthouses)

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

SVL/rh